

1658

United States

1652

Circuit Court of Appeals

For the Ninth Circuit.

HEALY TIBBITTS CONSTRUCTION COM-
PANY, a Corporation,

Appellant,

vs.

SHELL OIL COMPANY, a Corporation, and
SHELL UNION OIL CORPORATION, a
Corporation,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

FILED

NOV 8 - 1929

F. P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

HEALY TIBBITTS CONSTRUCTION COM-
PANY, a Corporation,

Appellant,

vs.

SHELL OIL COMPANY, a Corporation, and
SHELL UNION OIL CORPORATION, a
Corporation,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

INDEX TO THE PRINTED APOSTLES ON APPEAL.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Petition	14
Amendment to Petition for Interlocutory Decree Annulling or Modifying Restraining Order, to Permit Filing of Suits and Authorities Supporting Same, and Stipulation Thereon	44
Assignments of Error	53
Certificate of Clerk U. S. District Court to Apostles on Appeal	56
Citation	25
Decree of Defaults	46
Marshal's Return to Monition	19
Monition	21
Names of Proctors	1
Notice of Appeal	51
Notice of Monition	24
Order Denying Petition for Interlocutory Decree Amending and Modifying Restraining Order	51
Order for Issuance of Monition and Restraining Order	15

Index.	Page
Petition for Exoneration from or Limitation of Liability	3
Petition for Interlocutory Decree Annulling or Modifying Restraining Order, to Per- mit Filing of Suits and Authorities Sup- porting Same	29
Praecipe for Apostles on Appeal	1
Report of U. S. Commissioner on Valuation, etc.	27
Stipulation and Modification on Restraining Order	48

NAMES OF PROCTORS.

Proctors for Petitioners and Appellees:

FARNHAM P. GRIFFITHS, Esq.

McCUTCHEN, OLNEY, MANNON &
GREENE.

Proctors for Appellant:

WILLIAM DENMAN, Esq.

EDWIN T. COOPER, Esq.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

The Healy Tibbitts Construction Company, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order and interlocutory decree denying said Healy Tibbitts Construction Company's motion and petition for Interlocutory Decree and Order annulling or modifying the restraining order made by said District Court enjoining the filing of suits by said Healy Tibbitts Construction Company against the barge "Martinez" and the petitioners for limitation arising from injuries sustained by Healy Tibbitts Construction Company by reason of the collision of said barge "Martinez" with Pier 45 in San Francisco Bay, entered herein on the 19th day of October, 1929, hereby requests you to prepare and certify apostles on appeal to be filed in said Appellate

Court in due course and to include in said apostles the following papers, documents and matters:

(1) Those matters specified in subdivision a and b of Paragraph 1 of Rule 4 of the Rules in Admiralty for the United States Circuit Court of Appeals for the Ninth Circuit. [1*]

(2) The petition for limitation of liability and all amendments thereto.

(3) Order for issuance of monition and restraining order.

(4) Monition and all proceedings taken, made and returned by the United States Marshal to this court.

(5) Findings and report of Commissioner on value of tug "Falcon."

(6) Healy Tibbitts Construction Company's motion and petition for interlocutory decree and order annulling or modifying restraining order, and all amendments thereto.

(7) Decree for default of all persons except Healy Tibbitts Construction Company.

(8) Stipulation and Court order allowing commencing of State Court suits by Healy Tibbitts Construction Company for faults of the barge "Martinez."

(9) Order and interlocutory decree denying said Healy Tibbitts Construction Company's petition and motion.

(10) Notice of appeal.

(11) Assignments of error.

*Page-number appearing at the foot of page of original certified Apostles on Appeal.

(12) This praecipe for apostles on appeal.

WILLIAM DENMAN,
EDWIN T. COOPER,

Proctors for Healy Tibbitts Construction Company,
Appearing Specially Herein.

[Endorsed]: Receipt of a copy of the within
praecipe for apostles on appeal is hereby admitted
this 30th day of October, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON &
GREENE,

Proctors for Petitioners.

Filed Oct. 30, 1929. [2]

PETITION FOR EXONERATION FROM OR
LIMITATION OF LIABILITY.

To the Honorable, the Judges of the Southern
Division of the United States District Court,
for the Northern District of California—In
Admiralty:

The petition of Shell Oil Company, a corporation,
and Shell Union Oil Corporation, a corporation, for
exoneration from or limitation of liability, civil
and maritime, alleges as follows:

I.

That petitioner, Shell Oil Company, now is, and
was at all times herein mentioned, a corporation
organized and existing under and by virtue of the

laws of the State of California, and was at all said times the charterer, under a bare boat charter, and operator of the steam tug "Falcon." The name of Shell Oil Company was at all the times herein mentioned Shell Company of California. The name of said corporation was changed to Shell Oil Company on January 1, 1929. That at all said times [3] the said steam tug "Falcon" was manned, victualed and navigated by and at the expense of said Shell Oil Company. That at all said times said steam tug "Falcon" was fully officered, manned, equipped and supplied, and was in all respects seaworthy.

II.

That Shell Union Oil Corporation now is, and was at all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of California, and now is, and was on the 23d day of July, 1928, the principal stockholder in said Shell Oil Company.

III.

That said steam tug "Falcon" at all times herein mentioned was, and now is, a vessel of the United States, and was at all said times employed by petitioner, Shell Oil Company, to tow its barges upon the navigable waters of the United States, to wit, the waters of the Bay of San Francisco. That said steam tug "Falcon" is now within the Northern District of California and the jurisdiction of this Honorable Court.

IV.

That in the afternoon of the 23d day of July, 1928, the said steam tug "Falcon" was sent to the Shell Oil Company Station at North Beach, San Francisco, in the basin between Pier 45 and the Golden Gate Ferry slips, for the purpose of towing the said barge "Martinez" from said station at said place to the Shell Oil Company Station at Army Street, San Francisco. That while said steam tug "Falcon" was engaged in towing said barge "Martinez" out of said basin, the said barge "Martinez" was caused to collide with said Pier 45. Upon information and belief that said Pier 45 was damaged by the collision. [4]

V.

That Healy-Tibbitts Construction Company, which company petitioners are informed was engaged in constructing said Pier 45 at the time of said collision, is claiming damages from your petitioners in the amount of \$41,578.25. Upon information and belief, Healy-Tibbitts Construction Company is preparing to bring suit against your petitioners for damages in the said amount of \$41,578.25 for damage alleged to have been done to said pier by reason of said collision. That the attorney who has presented said claim in behalf of Healy-Tibbitts Construction Company is Edwin T. Cooper and his address is 620 Market Street (Room 801 Crocker Building), San Francisco, California.

VI.

That the circumstances of said collision were as

follows: The tug "Falcon" took the barge "Martinez" in tow at the bulkhead near the said Shell Oil Company station at North Beach. The barge "Martinez" was lying port side to the bulkhead and heading in a westerly direction when the tug "Falcon" made fast its hawser to the towing bridle of the bow of the "Martinez." At said time the tide was flooding and there was a westerly wind blowing.

The tug "Falcon," with the barge "Martinez" in tow, proceeded out toward the mouth of the said basin, and when the "Falcon" had reached the mouth of said basin and was in the vicinity of the upper and outer portion of Golden Gate Ferry slip No. 4, a ferry-boat belonging to and operated by the Golden Gate Ferry Company between San Francisco and Berkeley suddenly emerged from either slip No. 3 or slip No. 4 and cut across the bow of the "Falcon." In order to avoid a collision with the ferry-boat the "Falcon" stopped her engines. As soon as this was done the "Martinez," which had no motor power of its own, ranged ahead [5] because of the momentum it had, causing the towing hawser to slacken. As soon as the "Martinez" was released from the pull of the towing hawser, it commenced to fall off toward Pier 45, due to the influence of the flood tide and westerly wind. When danger of collision with said ferry-boat was avoided, the engines of the "Falcon" were immediately put at full speed ahead and the "Falcon's" wheel put hard astarboard in an effort to prevent the "Martinez" from striking Pier 45. In

spite of the "Falcon's" efforts the "Martinez" came in contact with Pier 45, her starboard quarter striking against the pier first.

VII.

That said damage to Pier 45 was not caused by any fault or negligence on the part of petitioners, or either of them. Upon information and belief that said collision was caused by the fault and negligence of the officers, agents and employees of the said Golden Gate Ferry Company, which company was operating the said ferry-boat. That said Golden Gate Ferry Company and its officers, agents and employees were negligent in the following respect, among others which petitioners beg leave to set up when more fully informed:

1. In crossing the bow of the tug "Falcon" under the aforesaid circumstances.

2. In not swinging clear of the mouth of said basin when the officers and crew of said ferry-boat knew or should have known that the tug "Falcon" was coming out of said basin with a tow.

3. In not giving sufficient warning to said tug "Falcon" that the said ferry-boat was about to emerge from her slip.

4. In causing said tug "Falcon" to stop her engines, in order to avoid a collision, with the result that the tow of said tug "Falcon" collided with Pier 45. [6]

5. In failing to navigate with proper care and caution under the circumstances.

VIII.

That said barge "Martinez," which at all said times was owned and operated by petitioner Shell Oil Company, had no motive power of its own, and being in the tow of the said tug "Falcon" was helpless and was entirely free from fault in the premises.

IX.

That said collision and said damage to Pier 45, under construction, and all other losses, destructions, damages or injuries, whether of or to the life of persons or to property or goods or merchandise, done, occasioned or incurred on said voyage, or due to or in anywise arising out of said collision hereinabove described, were done, occasioned and incurred without the consent or privity or knowledge or design or neglect of petitioners, or either of them, or fault or neglect of any of their officers, agents or servants.

X.

That the voyage upon which the aforesaid accident occurred and in connection with which the aforesaid damage was caused and as to which your petitioners seek exoneration from or limitation or liability, was terminated at the time and place of the collision.

That petitioners had no interest in said tug "Falcon" at said time other than the interest arising out of and by virtue of said charter-party. That the value of each of petitioner's interests in said tug "Falcon" at said time did not exceed the sum

of Two Hundred Fifty (250) Dollars. That nevertheless, in case this Court should find that the value of the interest of either petitioner was that of owner, under the circumstances, and the value of such interest equal to the value of the true owner's [7] interest, and in order to fulfill any obligation in that regard, each petitioner offers, under protest and without prejudice to the other allegations herein or the relief prayed for, to give its stipulation or undertaking in an amount equal to the entire value of the tug "Falcon" at the end of said voyage and in an additional amount, to wit, Five Hundred (500) Dollars to cover freight, or its equivalent, if any be found to be due.

XI.

That each of your petitioners desires to contest its liability for the injuries, losses and damages, whether to persons or to property or goods or merchandise, done, caused, occasioned or incurred by reason of the collision of the said barge "Martinez" with said Pier 45, and in the event your petitioners, or either of them, shall be found liable for any such losses, destructions, damages or injuries, or any part thereof, your petitioners do, and each of them does, hereby claim the benefit of the limitation of liability provided for in sections 4283 to 4289, inclusive, of the Revised Statutes of the United States, and also hereby claim the benefit of the limitation of liability, provided for in the Act of Congress of June 26th, 1884, Chapter 121, and particularly the benefits of Section 18 of said Act (23

Stat. at L. 57); and also hereby claim the benefit of the limitation of liability provided for in Section 4289, as amended by the Act of Congress approved June 19, 1886, Chapter 421, and particularly Section 4 of said last-mentioned Act; and also hereby claim the benefit of any and all Acts of the Congress of the United States, if any, amendatory or supplementary to the several sections and acts aforesaid, or any thereof. And each of your petitioners is now ready, able and willing, and hereby offers to give its stipulation or stipulations with sufficient sureties, conditioned for the [8] payment into this court by each of said petitioners of the value of petitioners' respective interests in the said steam tug "Falcon," if required, as of the date of said collision and termination of said voyage, to wit, July 23, 1928, with interest thereon, together with freight pending, if any, for and at the termination of said voyage, such payment to be made whenever the same shall be ordered herein.

XII.

Upon information and belief that there are no liens upon said tug "Falcon" prior or paramount to any liens that may have accrued by reason of the matter aforesaid and that the amount of the claims which have been made against petitioners, as hereinbefore set forth, exceeds the amount and value of the interest of your petitioners, and each of them, in said tug "Falcon," together with her freight pending, if any, at the end of said voyage.

XIII.

That, all and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioners pray that this Court order due appraisement to be had of amount or value of the respective interests of your petitioners in the said steam tug "Falcon," her engines, boats, boilers, tackle, apparel, furniture, etc., as the same were at the termination of the voyage upon which the collision hereinbefore described occurred, and due appraisement of the respective interests of your petitioners in the amount of freight pending, if any, at the termination of the aforesaid voyage; that this Honorable Court do make an order for the payment by each of said petitioners of their said [9] respective appraised value into the court or the giving of a stipulation by each of said petitioners, with sureties for the payment thereof into court, according to the value of the respective interests of said petitioners, whenever the same shall be ordered, with interest thereon at the rate of 6% per annum from the date of said stipulation, and that this Honorable Court will, upon the filing of such stipulation or of an *ad interim* stipulation by each of said petitioners, issue or cause to be issued a monition against the said Healy-Tibbitts Construction Company and against all other persons claiming damages against your petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons, or property, done, occurred, occasioned or arising upon

the voyage aforesaid, citing them, and each of them, to appear before this Court and make due proof of their respective claims at or before a time to be designated in said writ, according to the law and rules and practice of this Court, and that this Honorable Court also enjoin or otherwise restrain prosecution of any and all suit or suits, action or actions, libel or libels, or legal proceedings of any manner or description whatsoever, except in the present proceedings, against your petitioners, or either of them, in respect to any injuries, losses, damages, destructions, and any and all claims occurring or arising upon or in connection with the voyage aforesaid, or by reason of said collision, and that this Honorable Court do adjudge that neither of your said petitioners is or are liable to any extent for any loss, damage, destruction or injury, but if or in the event this Honorable Court should adjudge that your petitioners, or either of them, is [10] liable to any extent therefor, that such liability of each of your petitioners be limited to the amount or value of each of your petitioners' respective interests in said steam tug "Falcon," her engines, boats, boilers, tackle, apparel, furniture, etc., at the termination of the aforesaid voyage, and freight pending, if any, at the termination of said voyage, as hereinbefore in this petition set forth, and that such values may be determined by the appraisements of said interests, as hereinbefore prayed, and that in the event of either of your petitioners being held liable, the money paid or secured to be paid into Court by each, as afore-

said, be divided and prorated among the several claimants against each petitioner in proportion to the amount of their respective claims, duly approved and confirmed, saving to all parties any priority to which they may be legally entitled, and that your petitioners, and each of them, have such other and further relief as may be deemed meet and just in the premises.

FARNHAM P. GRIFFITHS,
McCUTCHEM, OLNEY, MANNON &
GREENE,

Proctors for Petitioners. [11]

State of California,
City and County of San Francisco,—ss.

A. R. Bradley, being duly sworn, deposes and says:

That he is an officer, to wit, the Secretary of Shell Oil Company, a corporation, petitioner herein; that he has read the foregoing petition, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

A. R. BRADLEY.

Subscribed and sworn to before me this 25th day of March, 1929.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 25, 1929. [12]

AMENDMENT TO PETITION.

To the Honorable, the Judges of the Above-entitled Court:

Come now petitioners above named and amend their petition on file herein as follows: Strike out the allegations of Article VIII of said petition and add in lieu thereof the following:

“VIII. That said Barge “Martinez,” which at all of said times was owned by petitioner Shell Oil Company, had no motive power of her own or any means of propulsion. That said barge was equipped with steering-gear and had her own crew on board. That said barge was in tow of said Tug ‘Falcon’ on a hawser and the master of said tug was in complete charge and control of the navigation of both vessels. That said barge was helpless, could not have taken any action to prevent the collision and was entirely free from fault in the premises.”

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON &
GREENE,

Proctors for Petitioners. [13]

State of California,
City and County of San Francisco,—ss.

A. R. Bradley, being first duly sworn, deposes and says: That he is an officer, to wit, the Secretary of Shell Oil Company, a corporation, one of the

petitioners herein; that he has read the foregoing amendment to petition on file herein, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

A. R. BRADLEY.

Subscribed and sworn to before me this 22 day of April, 1929.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Service of the within amendment and receipt of a copy thereof admitted this 22 day of April, 1929.

WILLIAM DENMAN and
EDWIN T. COOPER,
Proctors for Healy Tibbetts.

Filed Apr. 22, 1929. [14]

ORDER FOR ISSUANCE OF MONITION AND
RESTRAINING ORDER.

It appearing to this Court that a petition has been filed herein by the above-named petitioners, praying for exoneration from or limitation of liability for any injury, loss, or damage of whatsoever nature occasioned or incurred upon or arising out of or in connection with that certain voyage of the steam tug "Falcon" referred to in said petition; and said petition stating the circumstances on which such exoneration from or limitation of liability are

claimed, and on reading and filing the affidavits of value of said steam tug "Falcon" and her equipment as of the 23d day of July, 1928, verified the 25th day of March, 1929, and filed herein March 25th, 1929, and the *ad interim* stipulations executed by each of petitioners March 25, 1929, with the American Employers' Insurance Company as surety thereon, in the sum of Four Thousand (4000) Dollars, with interest from the 25th day of March, 1929, undertaking to pay into court the [15] amount or value of each of petitioners' interests in said steam tug "Falcon" and her pending freight, if any, when ordered by the Court, or to file in this proceeding a bond or stipulation for value, in the usual form with surety, in said amount, and that pending the payment into court of the amount or value of petitioners' interests in said steam tug "Falcon" and her pending freight, as ascertained, if any, or the giving of a stipulation for value thereof, the said bond to stand as security for all claims in said limitation proceeding; and

It appearing in said petition that a claim has been made by the Healy-Tibbitts Construction Company against said petitioners for damages in the amount of Forty-one Thousand Five Hundred Seventy-eight and 25/100 (41,578.25) Dollars, for damage alleged to have been done because of a collision with Pier 45 on the voyage referred to in said petition; and

It further appearing that prayer is made in said petition for the issuance of a monition against the said Healy-Tibbitts Construction Company and

against all persons claiming damages against said petitioner, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of the voyage aforesaid, and citing them, and each of them, to appear before this Court and there make due proof of their respective claims, and also to appear and answer the allegations in said petition; and

It further appearing that prayer is made in said petition that this Honorable Court issue its order or injunction restraining the further prosecution of any actions commenced against petitioners, or either of them, and the commencement and prosecution hereafter of any and all suit or suits, action [16] or actions, or legal proceedings of any nature or description whatever, against your petitioners, or either of them, arising out of or in connection with the said voyage referred to in said petition and/or the collision with said Pier 45 referred to therein.

And the Court being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED that a monition issue out of this court against the said Healy-Tibbitts Construction Company and against all persons claiming damages against said petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of the voyage aforesaid or the collision aforementioned on the

23d day of July, 1928, citing them to appear before this Court and make due proof of their respective claims on or before a certain date named in said writ not less than thirty (30) days from the issuance of the same, and also citing them to appear and answer in said cause, and Francis Krull, Esquire, is appointed Commissioner before whom proof of all claims which may be presented pursuant to said monition shall be made, subject to the right of any persons or parties to controvert or question the same; and

IT IS FURTHER ORDERED that public notice of such monitions shall be given, as in other cases, by publication thereof in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, and

IT IS FURTHER ORDERED that further public notice of said monition and the issuance of the same shall be given by the posting of copies of said monition in three (3) public places in the City and County of San Francisco; and [17]

IT IS FURTHER ORDERED that service of said monition and of this order, be made upon Healy-Tibbitts Construction Company by serving a copy thereof upon Edwin T. Cooper, Esquire, its attorney, at his office in the Crocker Building at 620 Market Street, San Francisco, California, at least ten (10) days before the return day of said monition; and

IT IS FURTHER ORDERED that the beginning or prosecution of any and all suit or suits, action or actions, or legal proceedings of whatever

nature or description against your petitioners, or either of them, except in the present proceeding, in respect of any claim or claims for damages by reason of any loss, damage, destruction or injury, whether of or to life or to persons or property, done, occasioned, incurred or arising out of that certain voyage of the steam tug "Falcon" described in said petition, and/or the said collision with Pier 45 referred to therein, be and the same are and each of them is hereby restrained and enjoined; and

IT IS FURTHER ORDERED that the service of this order as a restraining order be made within this and in any other district of the United States by delivery by the Marshal of the United States for such District of a certified copy of this order to the person or persons or parties to be restrained, or to the attorneys or proctors acting in their behalf.

Dated: March 25th, 1929.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Mar. 25, 1929. [18]

MARSHAL'S RETURN TO MONITION.

I do hereby certify and return that in obedience to the monition issued out of the above-entitled court in this proceeding, under date of March 25, 1929, I gave public notice of said monition by causing the annexed citation and notice of monition setting forth the substance of said monition, to be

published in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, daily, for three (3) days, and thereafter once a week until the return day of said monition, to wit, April 11th, 12th, 13th, 20th, 27th, May 4th, 11th, 18th and 25th, 1929, the first publication being at least thirty (30) days before the return day of said monition. Publisher's affidavit of publication is annexed hereto in support hereof.

I do further certify and return that I gave further notice of said monition by causing copies of said citation and notice of monition to be posted in three public places in the City and County of San Francisco, State of California, to wit, by posting the same in public places in the United States Post Office Building, the City Hall, and the Hall of Justice, in the City and County of San Francisco, State of California.

I further certify that monition, notice of monition, citation, and order for issuance of monition and restraining order were served upon Edwin T. Cooper, Esquire, attorney for [19] Healy-Tibbitss Construction Company, by delivering to and leaving with said Edwin T. Cooper at San Francisco, in said district, on the 28th day of March, 1929, a true and correct copy of said documents.

I further certify that monition, notice of monition, citation, and order for issuance of monition and restraining order were served upon Healy-Tibbitts Construction Company by delivering to *an* leaving with J. H. Edwards, said company's secretary, at San Francisco, in said district on the 26th

day of March, 1929, a true and correct copy of said documents.

And as commanded in said writ of monition, I return the same herewith, together with the citation issued in said matter and the said notice of monition.

Dated this 31st day of May, 1929.

FRED L. ESOLA,
United States Marshal for the Northern District of
California.

By FRED S. FIELD,
Deputy. [20]

MONITION.

The President of the United States of America to
The Marshal of the United States for the
Northern District of California, GREETING:
WHEREAS, a petition has been filed in the Dis-
trict Court of the United States, for the Northern
District of California, Southern Division, in the
above-entitled matter on the 25th day of March,
1929, by petitioners above named, the first named
as charterer and operator of the steam tug "Fal-
con" and the last named as principal stockholder of
Shell Oil Company, praying for exoneration from
or limitation of their respective liabilities concern-
ing any and all loss, damage or injury, either to
persons, parties or property, or by reason of loss
of life, occurring or arising upon, out of or in con-
nection with that certain voyage of said steam tug
"Falcon," terminating at the time of the collision
referred to in said petition at San Francisco, Cali-

fornia, on the 23d day of July, 1928, for the reasons and causes in said petition mentioned, and praying that a monition of this Court in that behalf be issued and that all parties and persons claiming damages for any loss, damage or injury of any character whatsoever may be thereby cited to appear before said Court and make due proof of their respective claims; and all proceedings being had, and if it shall appear that the petitioners, or either of them, are not liable for any such loss, damage or injury, it may be so finally decreed by this Court; and

WHEREAS, each of said petitioners has filed in the office of the Clerk of this court an *ad interim* stipulation in the sum of four thousand dollars (\$4,000), with interest from the 25th day of March, 1929, undertaking to pay into court the appraised amount or value of their respective interests in said steam tug and freight pending, if any, or to file in this proceeding a bond or stipulation in said amount for value, in [21] the usual form, with American Employers' Insurance Company as surety thereon; and the said Court having directed by an order made and entered on the 25th day of March, 1929, that a monition issue against all persons, and particularly Healy-Tibbitts Construction Company, claiming damages against said petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of the voyage named in the petition on file herein and/or the collision referred to in said petition,

which occurred on the 23d day of July, 1928, citing them, and each of them, to appear before this Court and make due proof of their respective claims on or before a certain day named in said writ,—

NOW, THEREFORE, all persons and parties claiming damages against petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of that certain voyage of the steam tug "Falcon," referred to in said petition in file herein, on the 23d day of July, 1929, and/or the collision referred to in said petition occurring on said day, are directed and admonished to appear before this Court and make due proof of their respective claims; and we do hereby empower and strictly command you to cite all persons and parties claiming damages against petitioners, or either of them, by reason of any loss, damage, destruction or injury, whether of or to the life of persons or property, done, incurred, occasioned or arising out of or in connection with the voyage aforesaid or the collision aforementioned, which occurred on the 23d day of July, 1928, to appear before said Court and make due proof of their respective claims before Francis Krull, Esq., Commissioner, at his office in the Post Office Building, corner of Seventh and Mission Streets, in the City and County of San Francisco, on or before the 30th day of May, 1929, at ten o'clock A. M. of said day; and [22]

YOU ARE ALSO HEREBY COMMANDED to cite all such claimants to appear and answer the

allegations of the petition herein on or before the said last named date, or within such further time as the Court may grant, and to have such relief as may be due.

And what you have done in the premises do then make return to this Court, together with this writ.

WITNESS the Honorable HAROLD LOUDERBACK, Judge of the District Court of the United States for the Northern District of California, this 25 day of March, in the year of our Lord one thousand nine hundred and twenty-nine, and of our Independence the one hundred and fifty-third.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, for the
Northern District of California.

By C. W. Calbreath,
Deputy Clerk. [23]

NOTICE OF MONITION.

To Whom It may Concern:

YOU ARE HEREBY NOTIFIED that on the 25th day of March, 1929, a monition was issued in the above matter by the above-entitled court against all persons claiming damages by reason of injuries to persons or property or for loss of life occurring upon or in connection with or arising out of that certain voyage of the steam tug "Falcon" terminating at the time it collided with Pier 45 in the Bay of San Francisco, State of California, on the 23d day of July, 1928, directing such persons to appear before the above-entitled court and make due proof of their respective claims and commanding

me to cite such persons to appear before the said Court and make due proof of their respective claims before Honorable Francis Krull, Commissioner, on or before the 30th day of May, 1929, at 10 o'clock in the forenoon of said day; and also commanding me to cite such persons to appear and answer the allegations of the petition herein on or before said date or within such further time as may [24] be granted by the Court.

Dated: San Francisco, California, March 25th, 1929.

FRED L. ESOLA,
United States Marshal for the Northern District of
California.

By FRED S. FIELD,
Deputy. [25]

CITATION.

United States of America,
Northern District of California,—ss.
To Whom It may Concern:

WHEREAS, a petition was filed in the Southern Division of the United States District Court, for the Northern District of California, on the 25th day of March, 1929, by Shell Oil Company, charterer of the steam tug "Falcon," and Shell Union Oil Corporation, principal stockholder of Shell Oil Company, praying for exoneration from or limitation of their liability concerning any and all loss, damage or injury, either to persons or to property, or by reason of loss of life, occurring upon or in

connection with, or arising out of, that certain voyage of the said steam tug "Falcon," terminating on the 23d day of July, 1928, more particularly described in the petition on file herein; and

WHEREAS, each of said petitioners has given an *ad interim* stipulation to abide by and pay any sum awarded by final decree rendered by the District Court or by an Appellate Court, if an appeal intervene, to the amount of each of said petitioners' [26] duly appraised interest in said vessel, her engines, boilers, boats, tackle, apparel, furniture, etc., and her freight pending, if any,—

NOW, THEREFORE, in pursuance of a monition issuing out of said court, to me directed and delivered, I do hereby cite all corporations, persons and parties claiming damages for any loss, damage or injury, either to persons or to property, or because of loss of life, occurring upon or arising out of or in connection with that certain voyage of said steam tug "Falcon" terminating as aforesaid at the Port of San Francisco, on the 23d day of July, 1928, to appear before said Court and make due proof of their respective claims before the Honorable Francis Krull, United States Commissioner, at his office in the Post Office Building, at the corner of Seventh and Mission Streets in the City and County of San Francisco, State of California, on or before the 30th day of May, 1929, at 10:00 o'clock in the forenoon of said day, and to answer the allegations of the petition herein on or before said last-named date; otherwise they will be in default and barred from participating in said

suit or proceeding, or having any claim against the said petitioners, or either of them, adjudicated.

Dated: San Francisco, California, March 25th, 1929.

FRED L. ESOLA,
United States Marshal for the Northern District of
California.

By FRED S. FIELD,
Deputy.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON &
GREENE,
Proctors for Petitioners,
Balfour Building, San Francisco, California.

[27]

REPORT OF U. S. COMMISSIONER ON
VALUATION, ETC.

To the Honorable The District Court of the United
States for the Northern District of California,
Southern Division—In Admiralty—and the
Judges Thereof:

Pursuant to an order made in the above-entitled
matter referring the same to me to appraise the
value of the steam tug "Falcon," her engines, boiler,
boats, tackle, etc., at the end of the voyage men-
tioned in the petition for limitation of liability filed
in the above-entitled matter and the freight, if any,
then pending, and the interest of petitioners therein,
I have to report that pursuant to the stipulation of

the parties hereunto attached and hereby referred to and made a part hereof, I do find and report:

“That the value of the tug ‘Falcon’ at the time of the collision of her tow, the ‘Martinez,’ with Pier 45 in July, 1928, was Three Thousand Dollars (\$3,000), and that the said tug had then no freight pending for the voyage on which the collision occurred; that the value of the Shell Oil Company’s interest as charterer in said tug at said time was Three Thousand Dollars (\$3,000); that the Shell Union Oil Corporation owns all the stock of said Shell Oil Company, and that in so far as said stock represents ownership of an interest in said vessel at said time, it is valued at one hundred per cent (100%) of the value of Shell Oil Company’s interest in said tug.”

All of which is respectively submitted.

Dated: May 1, 1929.

FRANCIS KRULL,
Commissioner.

[Endorsed]: Filed May 13, 1929. [28]

PETITION FOR INTERLOCUTORY DECREE
ANNULLING OR MODIFYING RE-
STRAINING ORDER, TO PERMIT FIL-
ING OF SUITS AND AUTHORITIES
SUPPORTING SAME.

To the Honorable HAROLD LOUDERBACK,
Judge of the United States District Court, in
the Southern Division, for the Northern Dis-
trict of California—In Admiralty:

The petition of Healy Tibbitts Construction Com-
pany, a corporation, hereinafter called the Healy
Company, appearing herein specially and exclu-
sively for the purpose hereof, alleges, as follows:

I.

That although the petitioners for limitation,
hereinafter called the Shell Companies, here seek
limitation of or exoneration from liability as char-
terers and operators of only the steam tug "Fal-
con," this court has issued its restraining order in
terms broad enough to restrain suits on claims
against them as owners and operators of the sepa-
rately managed and power-steered barge "Mart-
inez" arising out of the acts of the said barge as an
offending vessel. That said restraining order, of
date March 25, 1929, accomplished this, is apparent
from the following language of the order of this
court: [29]

“IT IS FURTHER ORDERED that the beginning or prosecution of any and all suit or suits, action or actions, or legal proceedings of whatever nature or description against your petitioners, or either of them, except in the present proceeding, in respect of any claim or claims for damages by reason of any loss, damage, destruction or injury, whether of or to life or to persons or property, done, occasioned, incurred or arising out of that certain voyage of the steam tug “Falcon” described in said petition, and/or the said collision with Pier 45 referred to therein, be and the same are and each of them is hereby restrained and enjoined; and”

That the jurisdiction of this Court “attaches *in rem* and *in personam* by reason of the custody of the *res* put by the petitioner in its hands.” (Taft.)

Hartford Acc. Co. vs. S. P. Co., 273 U. S. 207, at 217; 71 L. Ed. 612, at 616.

That the *res* is the vessel against which default is charged, here, as shown *infra*, the “Martinez,” made directly liable for her offenses, by Section (813) of the Code of Civil Procedure.

Until the “Martinez” becomes a *res* in the possession of this Court, it has no jurisdiction over controversies *in rem* against her or *in personam* for her acts as an offending vessel.

II.

That the barge "Martinez," mentioned in the petition for limitation of liability filed herein, was during her voyage to and at the time of the damage to Pier 45, described in said petition, and is now, a vessel having a crew of her own and having a steering gear controlled by machine power from her pilot-house, and was, at the time of striking the said pier, proceeding on a single hawser behind the tug "Falcon," and managed, controlled and steered by said barge's crew and steering gear. [30]

III.

That a separately officered and manned, power-steered barge, trailing behind a tug, may well be an active instrument and be liable *in rem* and her owners *in personam* for the barge's offenses, as distinguished from the sole fault of the tug, has been repeatedly held by the United States Supreme Court in the following cases:

The Virginia Ehrman vs. Curtis (1877) 24

L. Ed. 890.

A tug was towing a sailing vessel out through a narrow channel and collided with and sank a dredge anchored and working in the channel. The tug sought to excuse herself by blaming the vessel, and *vice versa*. The tug starboarded her helm just in time to avoid the collision. The vessel apparently had no lookout and ported when she should have starboarded her helm. The tug was also held at fault for going out in the channel so close to the dredge. The opening statement of the opinion by

Judge Clifford is interesting as a general statement of the law:

“Shipowners, if their ship is without fault, are entitled in a cause of collision, except where it occurs from inevitable accident, to full compensation for the damage their ship receives, provided it does not exceed the value of the offending vessel and her freight then pending; and the same rule applies where the injury is caused by the joint action of a tug and tow, if it be so alleged in the libel, and it appears that both were in charge of their own master and crew, and that each was in fault in not taking due care, or was guilty of negligence or of unskillful or improper navigation.” (891.)

The Maria Martin vs. Northern Trans. Co.,
20 L. Ed. 251, 254, 255. (Clifford, J.)

Tug was towing a sailing vessel. In passing a steamer the helmsman of the sailing vessel thought the order to port was one to starboard preparatory [31] to casting off, since the vessels were about in the place usual for casting off. It was this fault in steering that caused the collision. The tow alone was held at fault. She had her own master and crew on board.

The Mabey and The Cooper (1871) 20 L. Ed.
881. (Clifford, J.)

The “Cooper,” a ship, was about to go to sea. A tug was engaged but those in charge of the tug said it was dangerous to leave at the time desired by the ship due to strong ebb tide and ice floe. The ship

owners insisted and agreed to save the captain of the tug harmless if there was a loss. The Court said:

“Want of due care is shown in the fact that the ship went to sea at a moment when the master of the tug which had her in tow knew that it was not safe in view of the condition of the weather and tide; nor can the tug be held blameless any more than the ship, because the master ultimately yielded to the importunities of the owners of the ship and assumed the risk, subject to his claim on the owner of the ship for indemnity. Faulty navigation is also shown, which of itself is sufficient answer to the defense of inevitable accident.” (882)

That the distinction between (1) a barge lashed hard and fast to the structure of a tug, thus moving helplessly into collision under the tug's power and direction and having no mobility of her own requiring management and navigation, and (2) a barge trailing behind a tug, the barge navigating her course to conform to that of the tug by the control of the barge's officers and crew through her steering gear, is one of elementary maritime law.

In the former case the doctrine of *res ipsa loquitur* may apply or the Court, on the admitted facts, hold the tow as a mere passive instrument and her owners, as such, free of any possible claim of liability. Such is the decision of

Liverpool & etc. Nav. Co. vs. Brooklyn E. D. Terminal, 251 U. S. 48; 64 L. Ed. 130.

In that case Mr. Justice Holmes relies on the case of the Eugene F. Moran, 53 L. Ed. 600, also decided by him, where a tow not lashed alongside, but trailing behind a tug, as here the "Martinez," was held liable for her wrongful management as to her towing lights, which deceived the opposing vessel as to her whereabouts as she moved on her towline behind the tug. That the principle established applies as well to other offending acts of management and navigation of a trailing tow.

IV.

That the Healy Company has had and made since the said damage to said Pier 45, and now has and makes a claim *in rem* against the said barge "Martinez" and a claim *in personam* against the owners thereof, in the sum of \$41,578.25, arising out of and for said damage to said Pier 45, belonging to said Healy Company, based upon the negligent management, handling and steering of said barge, as an active and not passive instrument of the Shell Companies, and the officers and crew of said barge, which proximately and materially contributed to and caused said damage to said pier.

V.

That, prior to the filing and commencement of this said limitation proceeding, the Shell Companies were advised by the Healy Company that said Healy Company had and made a claim against said barge "Martinez" and its owners *in rem* and *in personam* because of said offenses of said barge.

VI.

That, despite said knowledge of said claim arising from the offenses of the "Martinez," said Shell Companies have failed to disclose said claim in their said petition, and have kept from the Court the said material fact regarding the claim arising from the collision with Pier 45, and have not surrendered or offered to surrender said barge "Martinez," or given, or offered to give, any stipulation for the value of the said barge, but obtained from this court of equity the said restraining order in terms so broad as to prevent the prosecution [33] of said claim, without the disclosure of said claim, or the making of said surrender, or the giving of such stipulation.

VII.

That the claims arising from the damage to said Pier 45 by the striking thereof by said barge are not within the cognizance or jurisdiction of the Admiralty Court of the United States, but are exclusively within the jurisdiction of the courts of the State of California, except and until "the custody of the *res*," the "Martinez," "has been put, by the Shell Companies, in the "hands" of this court. That the State of California, and particularly Sections 813 to 827 of the Code of Civil Procedure of said state, grants a right of action *in rem* to said Healy Company against said offending vessel, said barge "Martinez," for said damage to said pier. That section 714 of said Code requires that said right *in rem* shall be asserted in "actions * * * against the owners by name," thus bringing such

actions within the scope of said restraining order, so granted in excess of the Court's jurisdiction. That the laws of said state also grant to said Healy Company a right of action *in personam* against the corporate owner of said barge and its stockholders therefor, and that in each and both such causes of action said Healy Company would be entitled, under the laws of said state of California, to a jury trial of the issues thereof.

VIII.

That the right to maintain these limitation proceedings and to enjoin suits in other tribunals is founded and preconditioned, under the laws of the United States, upon the surrender of the vessel charged with the offense on which the claim is based, or a stipulation for its value, and that said Healy Company makes claim against said barge as such offending vessel. That the value of said tug "Falcon," which said Shell Companies offer to surrender, is nominal and would not meet more than a small percentage of the claim of this said petitioner. That the value of said barge substantially exceeds the entire claim of said Healy Company. That said attempt to prevent suit based on offenses of the barge and her [34] owners for such offenses, by the mere offer of the relatively nominal value of the tug is a subterfuge and evasion. It is an attempt to deprive the Healy Company of the right to adjudicate its claims *in rem* and *in personam* in a State Court and by trial by jury, without giving the consideration, i. e., the barge against

which the Healy Company's claim exists, required by the statute.

IX.

That in addition to the said claim of the Healy Company against the Shell Companies for the offenses of their said barge "Martinez," the Healy Company has a claim against the Golden Gate Ferry Company for its joint negligence with that of the barge "Martinez" and her owners, based upon the negligence described in the petition of the Shell Companies. That under the laws of the State of California the Healy Company may, in a single action, join the Shell Companies and the Golden Gate Ferry Company and try, in one trial, its claims against them for their alleged joint negligence and obtain a complete disposition of the controversy or controversies arising from said claim of joint negligence. That by reason of the said restraining order, so improvidently issued, and so beyond the jurisdiction of the Court to grant, the Healy Company would be compelled to try piecemeal, in different suits, its claim against the Ferry Company and its said claim against the Shell Companies, although arising from their joint negligence. That said claim of the Healy Company against the Golden Gate Ferry Company is not cognizable in admiralty because arising from an injury to a fixed land structure. That it is not a claim that can be heard in this limitation proceeding because there has been no surrender of the ferry-boat contributing to the joint negligence upon which said claim is based. That it is not a cause of action arising out

of the act of the "Falcon," but out of the acts of the ferry against which, and her owners, it is claimed. That as a result, instead of this limitation proceeding avoiding a multiplicity of suits with reference to the claimed offenses of the said barge "Martinez," it is, in fact, multiplying litigation, contrary to the equitable purposes of the Act of Congress, to the great and unnecessary harm to the Healy Company. [35]

That in the event the Shell Companies were able to compel the Healy Company to await until the decision of this Court and of the United States Circuit Court of Appeals, and possibly of the Supreme Court, upon the question of the responsibility of the "Falcon," and they finally establish that the "Falcon" was not responsible in any way and that they, as such petitioning charterers and operators thereof, were not responsible, such decision may well be made without deciding as to the responsibility of the barge "Martinez" and the Healy Company would then be compelled to litigate its claim against the barge "Martinez" and her owners in a State Court after several years time had elapsed from the occurrence of the collision. Such a procedure, instead of avoiding a multiplicity of suits, creates a multiplicity of suits and seriously imperils the chances of the Healy Company of making its proper proof to establish its claim either *in rem* or *in personam*.

Or, in the event that the Court should find that the barge "Martinez" was responsible, as charged, the Healy Company would have no lien upon her

because there is no lien on her cognizable in admiralty or enforceable in this proceeding. The only method by which the Healy Company's lien upon the "Martinez" is assertable is through the attachment of the common law Superior Court of the State of California through process served by the sheriff of the county issued out of said Superior Court. That during the period of the delay occasioned by the injunction so wrongfully obtained, the said barge may have been destroyed or transferred to innocent purchasers and the assertion of said lien as a right of the Healy Company be forever lost. [36]

X.

That said Healy Company has been served with the order for issuance of monition and restraining order, signed and issued in the above-entitled limitation proceeding, and said Healy Company is prepared to and desires to pursue its remedies, in the courts of and under the laws of the State of California, against said barge "Martinez" and/or its owners, for the damage to its said pier, claimed by said Healy Company to have been caused by the negligent management and navigation of said barge "Martinez."

XI.

That, by reason of the failure to disclose the true claim of said Healy Company, and, by reason of the failure to surrender or offer stipulation for the value of said barge "Martinez," petitioner, Healy Company, respectfully alleges that said restraining order was without the jurisdiction of this Court to

make, and was improvidently and inadvertently made and issued, so far as the same restrains said Healy Company from proceeding against said barge and its owners in the Superior Court of the State of California, pursuant to the laws thereof, to recover said damage to its said pier caused by the offenses of said barge, and that said restraining order should be amended and modified so as to permit such proceedings by said Healy Company, relative to the offenses of the barge "Martinez," as it may be advised.

XII.

That, after the filing of the said limitation proceeding and the service of said monition and restraining order, the proctors for the Healy Company again advised said proctors for the Shell Companies of the claim of this said petitioner and of their failure to set forth the same in their said petition, and of the fact that they had not surrendered, or offered to surrender, or stipulated for the value of said barge, and requested that they amend said petition for limitation to disclose the nature of the claims arising from the offenses of the barge "Martinez," but said Shell Companies have declined so to do, [37] and have asserted that the said restraining order should stand, despite such failure to disclose such facts in seeking and procuring *ex parte* such extraordinary relief, depriving the said Healy Company of its state forum and jury.

XIII.

That although the restraining order so prevents a

state suit based on the offenses of the barge "Martinez," causing the collision with Pier 45, nevertheless the citation issued herein is confined to claims arising from the voyage of the tug "Falcon," and the Healy Company thus has its hands tied on claims it is not summoned or cited to present in this forum.

XIV.

That the said restraining order was issued by this Court without any "due" appraisalment of the steam tug "Falcon." That Rule 53 of the United States Supreme Court requires that there shall be a due appraisalment and filing of a stipulation or bond in the appraised amount as a prerequisite to the issuing of the injunction and that the rules of this court require that such appraisalment shall be upon notice and after hearing in which the claimant shall participate. That the said rule of this District Court requiring said appraisalment is as follows:

"RULE 53.

Creditors and Lienors, When to be Stated in Petition.

If, instead of a surrender of the vessel, and appraisalment thereof be sought for the purpose of giving a stipulation for value, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner,

and the attorneys or proctors in any suits thereon; or if such creditors or lienors be numerous, then a sufficient number of them properly to represent all in the appraisement; and notice of the proceedings to appraise the property shall be given to such creditor as the Court shall direct, [38] “and to all the attorneys and proctors in such pending suits.”

That no said hearing was had and no appraisement made.

That notice of said claim was given to the Shell Companies more than three and one-half months prior to the filing of the petition for limitation and the issuance of the injunction. That no reason is shown, nor is there any existing, requiring precipitate action on the part of this court, such as the issuance of the restraining order without appraisement provided for by the rules, and no reason exists herein, or is there cause shown, for the giving of an *ad interim* stipulation, and that such restraining order issued thereon is null and void.

WHEREFORE, this petitioner, appearing specially therefor, prays that said restraining order be quashed as a whole if the Court hold that it was improvidently issued and if not so held that it be amended and modified so as to allow this said petitioner to pursue and enforce its claims and alleged rights of action in the courts of the State of California, against said barge “Martinez,” and its corporate owners, and the stockholders thereof, *in rem* and/or *in personam* for offenses committed by said barge, as it may be advised, and for such other and

further relief as may in the premises be deemed meet.

HEALY TIBBITTS CONSTRUCTION
COMPANY,

Petitioner,

Appearing Specially as Above and not Generally.

WILLIAM DENMAN,

EDWIN T. COOPER,

Proctors for Petitioner, Healy Tibbitts Construction Company, a Corporation, Appearing Specially as Above and not Generally. [39]

State of California,

City and County of San Francisco,—ss.

William H. Healy, being first duly sworn, deposes and says:

That he is the President of Healy Tibbitts Construction Company, a corporation, petitioner in the foregoing petition; that he has read the allegations thereof and that the same are true of his own knowledge, save where therein stated upon information and belief and, as to such allegations, he believes them to be true.

WILLIAM H. HEALY.

Subscribed and sworn to before me this 6th day of April, 1929.

[Seal]

KATHRYN E. STONE,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within petition is hereby admitted this 8th day of April, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON &
GREENE,

Proctors for _____.

Filed Apr. 8, 1929. [40]

AMENDMENT TO PETITION FOR INTER-
LOCUTORY DECREE ANNULING OR
MODIFYING RESTRAINING ORDER, TO
PERMIT FILING OF SUITS AND AU-
THORITIES SUPPORTING SAME, AND
STIPULATION THEREON.

IT IS HEREBY STIPULATED AND
AGREED by and between the parties hereto that
Paragraph IV of the above petition for modification
of the restraining order shall at all times be deemed
to have contained the following additional allega-
tions:

“That the said negligent management, handling
and steering of the said barge ‘Martinez’ included
(a) The negligent dispatching by the shore manage-
ment of the Shell Company of the said barge for
her voyage through the space between Pier 45 and
the ferry slip in the then condition of the wind and
tide; (b) the negligent steering of the barge ‘Mar-
tinez’ prior to the emergence of the ferry, as al-
leged in the petition for limitation herein, whereby
said barge ‘Martinez’ was not steered behind her
tug but was steered too far to the easterly and too
near to Pier 45, whether or not interfered with by

the ferry; (c) That after the emergence of the ferry the barge was steered negligently in this, that she failed to use her remaining headway to steer her to bring her parallel to the pier and thereby [41] minimize the damage, her failure so to do causing her to hit a much sharper dragging blow with her after starboard corner against a succession of piles, and that each of the above faults proximately contributed to the collision; that the Healy Company will make its defense and deny each of the above specifications of negligence; that the trial of the suit of the Healy Company, in the State Court, against the 'Martinez' and her owners, if not enjoined, will include the issues created by these allegations and denials; that in addition to the embarrassments and invasions of right created by the said Restraining Order, and hereinafter described, will be the probable loss of witnesses on behalf of the Healy Company during the period of the pendency of the said petition for limitation in this District Court and in the Circuit Court of Appeals, and its possible period of certiorari to the Supreme Court of the United States."

April 23d, 1929.

McCUTCHEM, OLNEY, MANNON &
GREENE,

Proctors for Shell Oil Company and Shell Union
Oil Corporation, Petitioners for Limitation.

WILLIAM DENMAN,
E. T. COOPER,

Proctors for Petitioner, Healy Tibbits Construction
Company, Appearing Specially, as Heretofore,
and not Generally.

[Endorsed]: Apr. 23, 1929. [42]

DECREE OF DEFAULTS.

This Court having heretofore issued a monition against Healy-Tibbitts Construction Company, a corporation, and against all persons and parties claiming damages from petitioners, or either of them, by reason of any loss, damage, injury or destruction, done, occasioned, or incurred upon or arising out of the voyage of the steam tug "Falcon" referred to in the petition herein, and/or arising out of or by reason of the collision which occurred on the 23d day of July, 1928, between the barge "Martinez" which was in tow of the tug "Falcon," and Pier 45, more particularly described in the said petition herein, citing them and each of them, and commanding the United States Marshal for the Northern District of California to cite them and each of them to appear before this Court and make due proof of their respective claims before Francis Krull, Esquire, the United States Commissioner for the Northern District of California, on or before the 30th day of May, 1929, at the hour of ten o'clock A. M. of said day; and

It appearing from the records and files herein that on the 28th day of March, 1929, a copy of the restraining order and order for monition, monition, notice of monition, and citation in this proceeding was duly served upon Edwin T. Cooper, Esquire, attorney for Healy-Tibbitts Construction Company, a corporation, and on March 26, 1929, upon said Healy-Tibbitts Construction Company; and

It further appearing by the return filed herein by the United States Marshal for the Northern Dis-

trict of California that public notice of said monition was given by said United States Marshal causing a citation and notice of monition, setting forth the substance of said monition, to be published in "The Recorder," a newspaper published in the City and County of San Francisco, State of California, daily, for three (3) days, and thereafter, once a week until the return [43] day of said monition, the first publication of said citation and notice of monition being at least thirty (30) days before the return day of said monition, and by causing said citation and notice of monition to be posted in three (3) public places in the City and County of San Francisco, State of California; and

It further appearing by the report of Francis Krull, Esquire, that at ten o'clock A. M. on the 31st day of May, 1929, no claims had been presented and filed herein; and

It further appearing that Healy-Tibbitts Construction Company, a corporation, has by stipulation on file herein been granted thirty (30) days' additional time in which to make its claim and to except, move and/or plead to the petition herein;

NOW, THEREFORE, on motion of Farnham P. Griffiths, Esquire, and McCutchen, Olney, Mannon & Greene, proctors for petitioners,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all persons, parties, firms and corporations, except Healy-Tibbitts Construction Company, a corporation, claiming damages from petitioners, or either of them, by reason of any loss, damage, injury or destruction, whether of or to life, or person, or property, or goods or merchandise, done or occasioned or incurred upon or

arising out of the voyage of the steam tug "Falcon" which ended as set out in the petition herein July 23d, 1928, or arising out of, in connection with, or because of that certain collision referred to in said petition between the barge "Martinez" and Pier 45 on the 23d day of July, 1929, when the said barge "Martinez" was in tow of the tug "Falcon," be and they are hereby adjudged to be in default, that said defaults be and they are hereby entered; and

IT IS FURTHER ORDERED that all issues raised by the petition herein, and the answer or answers which may hereafter be filed within the time granted by stipulation of the [44] parties or by this Court, shall stand for trial before this Court according to the rules and practices thereof.

Dated: May 31st, 1929.

HAROLD LOUDERBACK,
United States District Judge.

Filed: May 31, 1929.

Entered in Vol. 24 Judg. and Decrees, at page 205. [45]

STIPULATION AND MODIFICATION ON RE- STRAINING ORDER.

WHEREAS Healy-Tibbitts Construction Company, a corporation, has filed herein a motion to dissolve or modify restraining order heretofore issued herein on the 25th day of March, 1929, which motion is now under submission to the above-entitled court; and

WHEREAS said Healy-Tibbitts Construction Company wishes to file a suit against petitioners, the barge "Martinez," or any one or more of them,

in order to protect its asserted lien on or against the said barge "Martinez" under the statutes of the State of California, and

WHEREAS petitioners are willing that such suit may be filed but not tried or decided pending the final order or decree of the above-entitled court or of an Appellate Court, if an appeal be taken, on the motion and matters now under submission,—

NOW, THEREFORE, it is hereby stipulated and agreed that the order for issuance of monition and restraining order herein issued on the 25th day of March, 1929, may be and for the aforesaid limited purpose of this stipulation the same is hereby deemed [46] modified so that Healy-Tibbitts Construction Company may file any suit or suits, action or actions or legal proceedings of whatsoever nature or description against petitioners, the barge "Martinez" or any one or more of them in any court whatsoever and wheresoever situate in respect of any claim or claims for damages arising out of the collision of said barge "Martinez" referred to in the petition on file herein and caused by the fault, failure, neglect or misconduct of petitioners or their employees, or any of them, in despatching, navigating, managing, manning, equipping and supplying the said barge "Martinez."

This modification of said restraining order shall not be or be deemed to be an authorization to try or have tried or to submit for decision to any court any such suit or proceeding, permission to file which is hereby granted. Said Healy-Tibbitts Construction Company may, however, take testimony, in so far as the law and practice permit, in any such suit or proceeding so filed, but petitioners or either of

them or said barge "Martinez" shall not be required to plead to or answer any complaint or other pleading filed in any such suit against petitioners or said barge "Martinez" or any of them, and their time so to plead shall be and hereby is extended by Healy-Tibbitts Construction Company for a period of forty days after the above-entitled court enters its decision on the motion to modify or dissolve said restraining order now pending and under submission, if said motion is granted.

IT IS FURTHER AGREED that if and when the above-entitled court denies the motion of Healy-Tibbitts Construction Company now under submission and the order denying the same shall not be appealed or if appealed it is confirmed, and the Supreme Court of the United States do not reverse the same, then this stipulation and order shall be vacated and of no force and effect and the aforesaid restraining order of March 25th, 1929, shall be thereafter controlling and in full force and effect.

E. T. COOPER,

WILLIAM DENMAN,

Proctors for Healy-Tibbitts Construction Company.

McCUTCHEN, OLNEY, MANNON &
GREENE,

Proctors for Petitioners Shell Oil Company and
Shell Union Oil Corporation.

It is so ordered.

HAROLD LOUDERBACK,
United States District Judge. [47]

[Endorsed]: Filed Jul. 20, 1929. [48]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 19th day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

(ORDER DENYING PETITION FOR INTER-LOCUTORY DECREE AMENDING AND MODIFYING RESTRAINING ORDER.)

The petition for an interlocutory decree amending and modifying the restraining order, having been heretofore argued and submitted, and due consideration having been thereon had, IT IS ORDERED that said petition be and the same is hereby denied. [49]

NOTICE OF APPEAL.

To Shell Oil Company and Shell Union Oil Corporation, Petitioners Herein, and to Messrs. Farnham P. Griffiths and McCutchen, Olney, Mannon and Greene, Their Proctors:

You, and each of you, will please take notice that the Healy-Tibbitts Construction Company, the moving party, moving and petitioning for an interlocutory decree and order annulling or modifying the restraining order made by said District Court enjoining filing of suits by Healy-Tibbitts Construc-

tion Company against the barge "Martinez" and petitioners for limitation arising from injuries sustained by Healy-Tibbitts Construction Company by reason of the collision of the said barge "Martinez" with Pier 45 in San Francisco Bay, hereby appeals from that certain order and interlocutory decree made and entered herein on the 19th day of October, 1929, in favor of the Shell Oil Company and Shell Union Oil Corporation, and against the Healy-Tibbitts Construction Company, the moving party therein, and does hereby appeal from the whole of said order and interlocutory decree and from each and every part thereof to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 28th, 1929.

WILLIAM DENMAN,
E. T. COOPER,

Proctors for Healy Tibbitts Construction Company,
Appearing Specially Herein. [50]

[Endorsed]: Due service and receipt of a copy of the within notice of appeal is hereby admitted this 28th day of October, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON &
GREENE,

Proctors for Petitioners.

Filed Oct. 30, 1929. [51]

ASSIGNMENTS OF ERROR.

Now comes the Healy Tibbitts Construction Company, a corporation, appellant, and assigns error herein as follows:

The District Court erred in holding:

I.

That in a limitation proceeding it had jurisdiction and right to enjoin the Healy Tibbitts Construction Company from bringing a State Court suit against the barge "Martinez" or against the Shell Companies, her owners and operators, because of her faults, when no appraisal was had of her value and no stipulation given and filed for her value, or at all.

II.

That the mere allegation by the owners of innocence of fault of their barge "Martinez" in their petition for limitation of liability, without the surrender of the vessel, or her appraisal, or giving a stipulation for her value, conferred jurisdiction to hear and determine the right to limit liability for damages arising from her fault or to restrain the person, claiming damages from the faults of the "Martinez," from bringing a State Court suit *quasi in rem* against the vessel or *in personam* against the owner. [52]

III.

That the mere allegation in the petition for a

limitation of liability of the innocence of the barge "Martinez" and of the innocence of her tug "Falcon" and the giving of a stipulation for the value of the allegedly innocent "Falcon," without giving such a stipulation for the "Martinez" worth, confers jurisdiction to enjoin a suit against the "Martinez" or the Shell Companies, her owners, for faults claimed to have been actively committed by the "Martinez" by her own officers and crew as distinguished from the officers and crew of the "Falcon."

IV.

That the giving of a stipulation for \$3,000, the value of the allegedly innocent "Falcon," and the failure to give a stipulation for upwards of \$55,000, the value of the allegedly innocent "Martinez," confers jurisdiction to enjoin a suit for \$50,000, based on the latter's own faults as distinguished from the faults of the tug.

V.

That the above-described \$3,000 "Falcon" stipulation confers jurisdiction to enjoin a state suit to enforce a state statutory lien on the "Martinez" for \$50,000, and thereby destroy the lien, and to compel a claim for \$50,000 damage to a pier to litigate the same in admiralty where there is no lien on the "Martinez" for damages to such a land structure.

VI.

That the injunction restraining the Healy Tibbitts Construction Company from prosecution of its said claims could be issued before its suit was

filed, whereas under U. S. Supreme Court Admiralty Rule 51 such injunction can be issued only “when any ship or vessel shall be libeled or the owners thereof shall be sued.”

VII.

That the owners of a vessel, without surrendering her or stipulating for her value, can obtain jurisdiction to deprive a litigant against her or them [53] (1) of his right to an unlimited recovery of damages; (2) of his right to a jury trial; (3) of his state statutory lien, not cognizable in admiralty; (4) of a joint State Court trial of claims non-maritime in character against several defendants, mostly not in the limitation proceeding, charged with joint and several fault causing the claimed damage; (5) of his state right to use the depositions of the defendants taken before the trial, and other state remedies.

WILLIAM DENMAN,
EDWIN T. COOPER,

Proctors for Healy Tibbitts Construction Company, Appearing Specially Herein.

[Endorsed]: Receipt of a copy of the within assignments of error is hereby admitted this 30th day of October, 1929.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, MANNON &
GREENE,

Proctors for Petitioners.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 54 pages, numbered from 1 to 54, inclusive, contain a full, true and correct transcript of the records and proceedings, in the Matter of the Petition of Shell Oil Company et al., etc., for Limitation of Liability, No. 19,972, as the same now remain on file of record in this office.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Twenty Dollars (\$20.00) and that the same has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 1st day of November, A. D. 1929.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [55]

[Endorsed]: No. 5979. United States Circuit Court of Appeals for the Ninth Circuit. Healy Tibbitts Construction Company, a Corporation, Appellant, vs. Shell Oil Company, a Corporation, and Shell Union Oil Corporation, a Corporation,

Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 1, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

